

OCT 04 2007*Greene v. Federal Express*, No. 06-35715

NOONAN, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in the affirmance and dissent as to the reversal and remand. One thing happened to Greene because he filed the complaint: his work was audited. Audits were the way Kinko's achieved quality, and branch stores were routinely audited. That Greene received a low grade is not shown to have been discriminatory. For all that appears, it was his own fault that he failed to do well. His score in the July 2003 audit was not significantly lower than those of the two 2003 audits Kuhn conducted prior to the filing of the complaint.

Management attempted to reach a settlement of the complaint that would have absolved Greene of his poor performance scores while he abandoned the litigation. Management's move was irenic not retaliatory. When Greene did not accept the offer, the process of terminating him, already in progress, reached its inevitable conclusion. It's hard to believe that negotiations for settlement that fail justify an inference of retaliation.